No. 15114

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES J. FRIDAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Idaho, Southern Division

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FREDRICKS & ROBERTS,
Fidelity Building,
Boise, Idaho
Attorneys for Appellant.

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STATEMENT OF CASE

Appellant, Charles J. Friday, brought this action against the Appellee, United States of America, hereinafter called Government, under the provisions of the Tort Claims Act, Title 28, United States Code, Section 1346 (b), alleging that he was severely injured and permanently crippled in an automobile collision caused by the negligence of one of the Government's employees driving a truck belonging to the Government, and further, that the negligence

of a second employee of the Government was a contributing cause of the collision. Appellant alleged that both employees of the Government were acting within the course and scope of their employment for the Government at the time of their claimed acts of negligence (R 3-6). To this Complaint the Government filed Answer admitting that it employed the aforesaid employees, admitting the ownership of the truck and admitting the occurrence of the collision and that Appellant suffered certain injuries as claimed by him (R 7-8). The Government, by its Answer, generally denied all other allegations of the Complaint and set up the following additional defenses:

1. That the Court lacked jurisdiction over any claim based upon the negligence of one of its aforesaid employees for the reason that the alleged acts of that particular employee were in the performance of a discretionary function and suit was prohibited by the provisions of 28 USCA 2680(a) (R 7).

2. That the Government was released from all liability to Appellant by an instrument in writing given by Appellant and his wife to the aforesaid driver of the Government truck and his wife, releasing the driver and his wife from all liability to Appellant arising out of the collision. The release was set out verbatim in the Government's Answer (R 9-11).

The Government then filed requests for admissions asking Appellant in substance to admit his execution of the release for a valuable consideration, and that it ran in favor of one of the aforementioned

Government employees, which admissions Appellant made (R 12-14).

Appellee then moved for summary judgment (R 14-15), which motion the Court granted and judgment was subsequently entered in favor of the Government and against Appellant on January 20, 1956 (R 17-18). From this judgment Appellant has appealed (R 18).

JURISDICTION

Jurisdiction of the District Court is based upon Title 28, Section 1346 (b), United States Code Annotated, this being a civil action against the United States, for money damages accruing after January 1, 1945, for personal injury and loss of property caused by the negligent acts of employees of the Government while acting within the scope of their employment under circumstances where the United States, if a private person, would be liable to Appellant under the laws of Idaho where the negligent acts occurred.

This Court has jurisdiction to review the case on appeal by reason of Title 28, Sections 1291, 1293, 1294 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

This is an appeal from a Summary Judgment entered in the United States District Court for the District of Idaho against the Appellant (Plaintiff),

Charles J. Friday, and in favor of the Government (Defendant), United States of America.

Appellant brought this action pursuant to the Tort Claims Act and Summary Judgment was granted before trial after the matter was at issue.

Plaintiff's Complaint alleged in substance that Francis E. Fennerty, an employee of the Government, was, in the course and scope of his employment, driving a certain truck belonging to the Government in an easterly direction along U. S. Highway 30, three and one-half miles West of the City of Boise, Idaho; that Fennerty negligently drove the Government truck into the rear of a certain jeep being driven by one Ralph Lacy and propelled the jeep across the center line of the highway and into the path of Appellant's automobile then being driven by Appellant in the opposite direction along the highway; and that as a result of this three car collision, the Appellant was badly injured and permanently crippled in certain particulars, more particularly set out in the Complaint, and Appellant incurred certain doctor, medical and hospital bills and loss of his automobile. Appellant's Complaint further charges that S. W. West, another employee of the Government and the immediate supervisor of Fennerty, negligently authorized and directed Fennerty to drive the truck at the aforesaid time and place when Fennerty was in a fatigued condition, directing Fennerty to drive the truck without allowing him to obtain sufficient rest before doing so; and that Fennerty fell asleep while driving the truck; and that falling asleep due to his fatigued condition

combined with other negligence of Fennerty, caused the collision and Appellant's injuries and damage in the total amount of $61,386.85 (R 3-6).

The Government filed Answer to Appellant's Complaint, making certain admissions and denials not pertinent to questions involved in this appeal and pleaded as Exhibit "A" a release executed by Appellant and wife to Francis E. Fennerty and wife (R 7-12), and filed requests for admissions (R 12-13), which requests in substance were that the parties to the release were the same parties as involved in the collision and as named in Appellant's Complaint, and that the release was a true copy of the original and executed for a valuable consideration. Appellant subsequently made the admissions requested (R 13-14). The Government then moved for Summary Judgment, which was granted upon three grounds (R 15-18). They are:

1. That the act of S. W. West in compelling Francis E. Fennerty to drive a Government vehicle when Francis E. Fennerty was in a tired and fatigued condition and unfit to be driving, could not be a proximate or contributing cause of the collision and Appellant's injuries.

2. That the acts of S. W. West were discretionary acts and thus within the classification of suits prohibited by the Tort Claims Act, 28 USCA 2680 (a).

3. That the release by Appellant of Francis E. Fennerty, released likewise the Government, despite the reservations in the release.

Since the exact language employed in the release to Fennerty will be constantly referred to and is

directly involved in a determination of at least a part of the questions raised on this appeal, we set forth the full text of the release.

RELEASE IN FULL

For and in consideration of the sum of Five Thousand Dollars ($5,000.00) and other valuable consideration, the receipt of which is hereby acknowledged, the undersigned do hereby release and forever discharge Francis E. Fennerty and Phyllis C. Fennerty, jointly and severally, from any and all claims, demands, damages, expenses, costs, causes of actions and suits growing out of and arising by reason of that certain accident which occurred on or about October 30, 1953, on U. S. Highway 30, at or near two and one-half miles west of Boise, Ada County, Idaho, inflicting upon the undersigned serious personal injuries and property damages.

It is understood and agreed that this is a full and final release of all liability of whatever character, kind or nature, growing out of the above captioned accident by reason of personal injuries and property damages sustained by the undersigned as against the said Francis E. Fennerty and Phyllis C. Fennerty.

It is further understood and agreed that payment hereunder is not and shall not be construed as admission of liability by the said Francis E. Fennerty and Phyllis C. Fennerty and that this is a full, complete and final compromise settlement

of disputed claims as between the parties hereto.

It is further understood and agreed that this release, as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tort feasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feasor or tort feasors causing or contributing to the damages and injuries suffered by the undersigned.

D a t e d this 7th day of December, 1953, at Seattle, State of Washington.

CHARLES J. FRIDAY
DOROTHY W. FRIDAY

Witness:
FRED C. MATHERRY

Subscribed and sworn to before me this 7th day of December, 1953, at Seattle.

THOS. MARSHALL
Official Title:
Notary Public in and for the State of Washington, residing at Seattle.

The above facts briefly stated are the necessary facts for a determination of the issues presented in this appeal.

SPECIFICATIONS OF ERROR

1. The District Court erred in granting Summary Judgment in favor of the Government and in adjudging that the Government was entitled to Summary Judgment, as a matter of law, upon the pleadings and records in the case.

2. The District Court erred in ruling, without having heard the evidence, that the acts of S. W. West in compelling Francis E. Fennerty to drive a Government vehicle upon a public highway when Francis E. Fennerty was in a fatigued condition and unfit to be driving, could not be a proximate cause of the collision and Plaintiff's injuries.

3. The District Court erred in ruling, without having heard the evidence, that the acts of S.W. West were discretionary acts and thus within the classification of suits prohibited by the Tort Claims Act.

4. The District Court erred in ruling that the release given by Appellant and wife to Francis E. Fennerty and wife released the Government from all liability to Appellant under the Tort Claims Act.

STATEMENT OF ISSUES

1. Was Appellant entitled under the allegations of his Complaint to present evidence on the issue of whether the negligence of the Government employee, S. W. West, was a contributing proximate cause of the accident?

2. Did the District Court err in ruling that the acts of the Government employee, S. W. West, were

discretionary acts and within the classification of suits prohibited by the Tort Claims Act, 28 USCA 2680 (a), when the Court had nothing before it by way of allegations, admissions or evidence to indicate the relationship of the Government employee, West, to Government employee, Fennerty, except that West was the immediate supervisor of Fennerty and without having before the Court by way of allegations, admissions or evidence any facts concerning the kind, character or nature of the Government function and employment being performed by West and Fennerty?

3. Did the release given by Appellant and wife to Fennerty and wife release the Government's liability to Appellant under the Tort Claims Act despite the following reservations in the release:

> "It is further understood and agreed that this release as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tort-feasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feasor or tort feasors causing or contributing to the damages and injuries suffered by the undersigned"?

ARGUMENT

The question to be determined on this appeal is whether the District Court correctly granted Summary Judgment in favor of the Government upon the pleadings and other documents constituting the records of the case.

The Summary Judgment was granted upon three grounds, each of which we maintain were erroneous. These grounds are:

A. That a supervisor's acts in requiring an employee to drive a motor vehicle when the employee is so fatigued as to be in an unfit condition to drive could not, as a matter of law, constitute actionable negligence.

B. That the acts of a Government supervisor in directing an employee to drive a Government vehicle is a discretionary act, and suit for such act is barred by the Tort Claims Act, 28 USCA 2680 (a).

C. That a release of a Government employee, even though the release is limited to the employee, necessarily releases the Government from liability under the Tort Claims Act.

In the interest of clarity, we will discuss these propositions separately and in the order above listed.

A.

A person undertaking to drive an automobile, knowing that he is fatigued and sleepy, is acting negligently and his conduct, if it results in injury to others, constitutes actionable negligence.

Curtis et al vs. Curtis, 58 Idaho 76, 70 P 2d 369.

It is a matter of common knowledge that inertia and drowsiness superinduced by loss of sleep and physical or mental fatigue renders a driver incapable of properly and safely operating an automobile and results daily in serious accidents.

Reynolds Adm'x vs. Waggoner, 111 S.W. 2d 647, 271 Ky. 300.

That the above propostion is well settled law is illustrated by the large number of cases holding that a guest who will ride in an automobile, knowing the driver to be sleepy, is guilty of contributory negligence if he is injured as a result of the driver's falling asleep at the wheel, and the recovery by the guest is barred. The question is one of fact for the jury to determine. The following cases serve as illustrative examples:

Curtis et al vs. Curtis, 58 Idaho 76, 70 P 2d 369;

Reynolds Adm'x vs. Waggoner, 111 S.W. 2d 647, 271 Ky. 300.

It is well settled basic law that a person who places an automobile in the hands of an incompetent driver whom he knows, or in the exercise of ordinary care should know, to be incompetent to drive the automobile safely is liable for injuries caused by the driver's incompetence; and such conduct constitutes action-

able negligence. Late cases announcing this rule are annotated in

31 ALR 2d 1445, at page 1457.

Under such circumstances the master is liable for the conduct of the servant in permitting an incompetent driver to operate the vehicle.

The Idaho Supreme Court has ruled that the act of a driver in falling asleep may not only constitute simple negligence, but may even constitute gross negligence,

Curtis et al vs. Curtis, 58 Idaho 76, 70 P 2d 369

so, also, the act of a supervising employee directing an incompetent employee to operate a vehicle on the public highways could constitute not only actionable negligence but even gross negligence.

The general rule is that a person is chargeable with actionable negligence when he knowingly entrusts the operation of an automobile to an incompetent driver.

MacCalla vs. Grosse, 109 Pac. 2d 358, 42 Cal. App. 2d 546;

Golemds vs. Blumbers, 262 App. Div. 759, 27 NYS 2d 692;

Hale vs. Worthington, 130 NJL 162, 31 A 2d 844.

From the foregoing cases and citations it is apparent that the District Court erred in ruling as a

matter of law that Appellant could not predicate liability on the Government for its action in directing a sleepy and fatigued employee to drive an automobile. Appellant's Complaint charged that Appellant was injured as a result of the negligence of a Government employee directing an inferior employee, in a tired and fatigued condition, to drive a Government vehicle upon the public highway; that the tired, fatigued employee fell asleep while driving and injured Appellant (R 3-6). The acts of the supervising employee clearly, as a matter of well settled law, could well constitute actionable negligence, depending upon the exact facts and circumstances proven by Appellant at the trial. While an automobile, for most purposes, is not considered by the Court to be a dangerous instrumentality so as to make its user absolutely liable in all circumstances, yet the operation of an automobile on a public highway is sufficiently hazardous to require a person operating or directing the operation of an automobile, in the exercise of ordinary care, not to permit such operation by a person sleepy and fatigued to the extent that the driver's faculties and reactions are dulled. To permit and direct such operation of an automobile creates a dangerous situation extremely likely to result in harm and injury to others, and obviously such conduct constitutes actionable negligence. The evidentiary facts showing the exact circumstances surrounding the supervisor's acts were, of course, not pleaded; and the District Court reached an arbitrary, unwarranted conclusion in deciding this issue without evidence upon which to base a decision.

B.

The second ground or basis for granting Summary Judgment was that S. W. West, an employee of the Government in the U. S. Geological Survey, Ground Water Branch, was, at the time of directing Government employee Fennerty to drive the Government truck, acting in the discharge of a discretionary function or duty; and suit was barred by the Tort Claims Act.

So far as material to the determination of this point, the Act, Title 28 USCA Section 2680 (a), provides:

> "The provisions of this Chapter and Section 1346 (b) of this Title shall not apply to:
>
> "(a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government whether or not the discretion involved be abused."

In this case the general function or duty of the Government being performed or engaged in for the Government by Government employee West does not appear from the pleadings or record in the case, so that it is impossible to determine positively, from the pleadings and record in this case, whether or not the function or duty was discretionary. All that ap-

pears from the pleadings is Appellant's allegation that one Government employee, acting within the scope of his employment, directed and authorized another Government employee to drive a Government truck to a Government installation and return (R 4-5). Whether this was done in connection with a discretionary function does not appear in the record; and the District Court's conclusions that a discretionary function or duty was involved was entirely arbitrary and not in any way supported by the record. It was clearly error for the District Court to rule against Appellant without having in the record any basis whatsoever for the ruling. Whether or not a discretionary function or duty of the Government was involved will depend upon proof to be adduced at the trial or upon facts brought out by appropriate discovery proceedings.

The Government, by its Answer, claimed the function or duty of employee West to be a discretionary one within the meaning of the Act (R 7). But an allegation in an Answer certainly is not proof, and the allegation standing alone is not sufficient to support a Judgment. The Government's allegation was one in defense, and there is no proof or facts before the Court to support it. As the record stands, it is a bare assertion and nothing more.

When issues of fact remain undetermined, they must be determined

88 C.J.S. p. 21, note 53;
89 C.J.S. p. 418, note 54;
46 C.J. p. 1224, note 60;

Clair et al vs. Sears Roebuck & Co., 34 F. Supp. 559;

Van Wormer vs. Champion Paper & Fiber Co., 28 F. Supp. 813;

Refractolite Corp. vs. Prismo Holding Corp., 25 F. Supp. 965.

by proof

Frank Adam Electric Co. vs. Westinghouse Electric Mfg. Co., 146 F (2) 165;

Donnelly Garment Co. vs. National Labor Relation Board, 123 F (2) 215, 224.

presented by sworn testimony or by agreement of counsel

89 C.J.S. p. 373, note 36.

Any decision on the issues of fact must be based on evidence admitted in the case

89 C.J.S. p. 417, note 46.

So far as appears from the pleadings and record in this case, the only Government function or duty involved was the normal routine performance of a required duty, i.e., the assigning of an employee to a particular task. That such function or duty is not what is meant by discretionary function or duty is clearly pointed out in the following cases:

Somerset Seafood Co. vs. United States, 193 F. 2d 631;

Costly vs. United States, 181 F. 2d 723.

Once having undertaken the performance of the duty, the discretion, if any existed, has been exercised. This point is clearly illustrated by the factual situation in both the above cases. See also

Johnson vs. District of Columbia, 118 U.S. 19, 6 S. Ct. 923, 30 L.E.D. 75;
Toledo vs. United States, D.C. 95 F. Supp. 838;
Dishman vs. United States, D.C. 93 F. Supp. 567, 571;
United States vs. Gray, 199 F. 2d 239;
Grigalauskas et al vs. United States, 103 F. Supp. 543.

The District Court and the Government rely heavily upon

Dalehite vs. United States, 346 U.S. 15;

the case involving the Texas City disasters. The United States Supreme Court, in that case, considered discretionary functions and duties within the Tort Claims Act at great length. It is apparent from a study of that decision that the Dalehite case confirms Appellant's position in this case rather than the position of the Government.

Speaking of what is meant by discretionary function or duty of the Government within the meaning of the Act, the Supreme Court states on page 42 of the decision:

"In short the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a plan-

ning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program";

and again on page 30 the Court, speaking of exempted discretionary functions, states:

"This paragraph characterizes the general exemption as a highly important exception designed to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of the Government's agent is shown and the only ground for suit is the contention that the same conduct by a private individual would be tortious. . . The Bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion."

Thus it is clear that the mere authorization by one Government employee to drive a Government vehicle is not the discretionary function or duty exempted from the Act, but is rather the type conduct for which suit was specifically authorized by the Act. Employee West's conduct was simply common law negligence committed at the operational level rather than legislative, executive, judicial or planning level. It is indeed extremely difficult to imagine a situation where directing the driving of an auto-

mobile to a Government installation in the normal performance of duty would involve the exercise of discretion on a planning level.

C.

The third and last point involved in this appeal is whether the release given by Appellant to Fennerty also released the Government, Fennerty's employer, under the provisions of the Tort Claims Act. Should the Court hold with Appellant on this issue, a determination of other issues raised in this appeal is unnecessary.

There is no doubt but that a majority of American Courts hold that a *full general release* of one joint tort feasor releases another joint tort feasor, and the District Court and counsel for the Government has taken the position that this rule determines the issue in this case.

However, the rule just stated has no application to the facts of this case. The relationship of master and servant as respects the commission of a tort is not, strictly speaking, that of joint tort feasor.

McLaughlin vs. Siegel, 185 S.E. 873, 166 Va.

But, notwithstanding such distinction, the release was to Fennerty alone and specifically reserved the right to proceed against any and all other tort feasors against whom a liability might be predicated by reason of (1) independent negligence of, (2) acts by, or (3) liability on the part of such other

tort feasor (R 10-11). Certainly the language of the release clearly expresses an intent to release only the one Government employee, and the intention to reserve the right to proceed against the United States and all others is clearly expressed in the release (R 10-11). The Government's liability in this action is twofold, the same being based upon the negligent acts of employee West as well as upon the negligent acts of employee Fennerty.

It is apparent, therefore, that the law applicable to a full general release of a joint tort feasor has no application to this case, but rather the precise question is whether a limited release of one only of several negligent employees, reserving rights against all who may otherwise be liable to claimant, operates to release the Government employer under the Tort Claims Act.

The applicable rule of law has recently been announced by the Idaho Supreme Court, and is as follows:

> "Before one joint tort feasor can be held to be discharged from liability through the release of another, a consideration for such release must have been accepted by the plaintiff in full satisfaction of the injury."
>
> Valles vs. Union Pacific Railroad Co., 72 Idaho 231, 239, 238 P. 2d 1154.

The following authorities support this rule:

> Ellis vs. Esson, 50 Wis. 138, 6 N.W. 518, 36 Am. Rep. 830;

Chamberlin vs. Murphy, 41 Vt. 110;
Smith vs. Gayle, 58 Ala. 600;
Snow vs. Chandler, 10 N.H. 92, 34 Am. Dec. 140;
Wallner vs. Barry, 207 Calif. 465, 279 P. 148, at page 151;
Whiting vs. Plumas County, 64 Calif. 65, 28 P. 445.

The Idaho Supreme Court, in the Valles case, in discussing the effect of a release of one of several tort feasors upon the liability of other tort feasors, states:

> "Too many Courts in maundering on this subject have made such a fetish of the pat phrase 'there can be but one recovery for a tort' they have lost sight of and ignored the fundamental factor in even handed justice that it is as imperative that the tort claimant receive full compensation as it is that the tort feasors shall not pay twice or more than the full a w a r d , determined judicially or otherwise, as a unit or piece meal."

The Idaho Supreme Court has not directly held that a release of one joint tort feasor alone does not release the other. However, they have, in the Valles case, fully discussed the issue and held the above quoted law applicable to independent tort feasors and have quoted with approval the rule with respect to joint tort feasors. It is apparent from reading the Valles case that the Idaho Supreme Court takes the

position that a plaintiff is entitled to full compensation for his injury, and that a release of one wrongdoer shall not release another where there was no intention to do so and no consideration therefor.

While there are some authorities to the contrary, almost all modern Courts considering the subject will give effect to a release reserving rights against others than the one released.

76 C.J.S. 684-688;
Losito vs. Kruse, 24 N.E. (2d) 705, 126 ALR 1194.

Dean Wigmore says the rule that a release to one of several joint tort feasors as a discharge of all is merely a "surviving relic of the Cokian period of metaphysics." The real juristic vice of the rule, Mr. Wigmore says, is the claim that mere words of release to A must inexorably signify a release also to B and C. Nothing but false logic prevents a complete repudiation of this principle.

Black vs. Martin, 292 P. 577, 88 Montana 256.

We have been able to find only one case involving the precise question of whether, under the T o r t Claims Act, the release of the negligent Government employee, reserving rights against the Government, was effective to preserve the rights against the Government. That case is:

United States vs. First Security Bank of Utah, (1953, CA 10th Utah) 208 F (2) 424, 42 ALR 2d 951;

and involved a settlement by the injured claimant with the Government employee whose negligence allegedly caused the injury. The claimant executed a covenant not to sue, and the right to proceed against the Government, under the Act, was specifically reserved. The Court held that the cause of action against the United States was not barred under the provisions of 28 USCA 2680 (a) of the Tort Claims Act, even though the Government employee had been released. The Court stated that under the terms of that Section, Congress had, with meticulous care, provided that recovery of the judgment against the Government should constitute a bar to any action against an employee, but for reasons satisfactory to it, had not provided that satisfaction of a claim against an employee should bar the action against the Government; and the Court consequently held the Government not released. Our case does not differ from that case in any material respect. The intention of the parties, as shown by the instrument, in both cases, was to relieve only the employee from liability and no one else.

CONCLUSION

The trial court erred in ruling that the act of Government employee West, in directing Government employee Fennerty to drive a Government vehicle upon the public highways when Fennerty was in an unfit condition to drive due to fatigue and loss of sleep, could not be actionable negligence and the proximate cause of Appellant's injuries. The trial court

further erred in ruling on this point without any evidence upon which to base the ruling.

The trial court erred in ruling that the court had no jurisdiction of the action based upon the alleged negligence of Government employee West because his negligent acts were in the performance of a discretionary function or duty as set out in 28 USCA 2680 (a). The trial court further erred in ruling on this point without evidence to support the ruling.

The trial court erred in ruling that the release of Government employee Fennerty, by claimant, released also the Government, when the release shows on its face that it was intended only to release the employee and not the Government and others and where there was no consideration for a complete release.

The trial court erred in granting Summary Judgment against claimant and in favor of the Government.

Respectfully submitted,

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